

Honorable Karen L. Strombom
TRIAL DATE: April 4, 2007

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON, AT TACOMA

EMPLOYEE PAINTERS TRUST HEALTH &
WELFARE FUND, WESTERN
WASHINGTON PAINTERS DEFINED
CONTRIBUTION PENSION TRUST,
WESTERN WASHINGTON
APPRENTICESHIP AND TRAINING TRUST,
WESTERN WASHINGTON PAINTERS
LABOR MANAGEMNET COOPERATION
TRUST FUND, INTERNATIONAL UNION
OF PAINTERS & ALLIED TRADES
PENSION FUND AND INTERNATIONAL
BROTHERHOOD OF PAINTERS & ALLIED
TRADES UNION & INDUSTRY FUND, and
INTERNATIONAL UNION OF PAINTERS &
ALLIED TRADES DISTRICT COUNCIL NO.
5,

Plaintiff,

vs.

TIMOTHY E. JACKSON and JODI L.
JACKSON, and the marital community
comprised thereof, and BRYDON PAINTING
SERVICE,

Defendant.

CAUSE NO.: C06-5145KLS

AGREED PRETRIAL ORDER

Jurisdiction

Jurisdiction is conferred on this Court by §301(a) of the Labor-Management Relations Act, (the Act) 29 USC §185(a) and §§502(a)(3) and 502(e)(2) of Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §§1132(a)(3) and 1132(e)(2). The Defendant is doing business as defined in §301(a) of the Labor-Management Relations Act, 29 USC §141 et seq within in the jurisdiction of this Court.

Claims

The Plaintiff will pursue at trial the following claims against the Defendants:

1. Breach of the Collective Bargaining Agreement by the Defendant, violation of ERISA Section 502 and 515, and violation of the Labor-Management Act.

Defenses

The Defendant will pursue at trial the following defenses to the claims of the Plaintiffs:

1. Breach of the Collective Bargaining Agreement by the Plaintiff.
2. Contributions made to the Trust under the Collective Bargaining Agreement by the Defendants met or exceeded the amounts owed to Plaintiffs and were paid as a mistake of law or fact.
3. The 2000 Collective Bargaining Agreement contained an “evergreen clause” requiring that without proper notice of modification or termination of the Collective Bargaining Agreement that the Agreement would be automatically renewed on terms of old Agreement on an annual basis.
4. Plaintiffs are not entitled to payment for contributions in November and December of 2005 which were for non-union related work by employees of Defendant.

Counterclaims

The Defendant will pursue at trial the following counterclaims against the Plaintiffs:

1. Defendants are entitled to a refund for contributions made to the Trust under theories of restitution and unjust enrichment.
2. The Plaintiffs object to the Defendant's counterclaim on the basis that such a claim is untimely and contrary to controlling Federal Law as evidenced in ERISA §403 (2)(A)(ii), 29 U.S.C. § 1103 (2)(A)(ii).

Admitted Facts

The parties admit the following facts:

1. The Employee Painters Trust Health & Welfare Fund, Western Washington Painters Defined Contribution Pension Trust, Western Washington Apprenticeship and Training Trust, Western Washington Painters Labor Management Cooperation Trust Fund, and the International Brotherhood of Painters & Allied Trades Industry Fund (the Plaintiff Trust Funds) are joint Labor-Management Trust Funds and as such are governed under the Act, 29 USC §141 et seq. and ERISA 29 U.S.C §1001 et seq.
2. Brydon Painting (the Defendants) and the International Union of Painters and Allied Trades (the Union) signed a Collective Bargaining Agreement effective March 1, 2000, through February 28, 2005.
3. The Trust Funds are third-party beneficiaries to the Collective Bargaining Agreement between the Defendants and the Union.
4. The Defendants have made contributions to the Trust Funds from March 2000 through September 2006.

- 1 5. The Defendant's employees have applied for and received benefits from the
- 2 Trust Fund in accordance with the Trust Agreement and Collective
- 3 Bargaining Agreement from March 2000 through September 2006
- 4 6. By signing the Collective Bargaining Agreement the Defendants agreed to
- 5 be bound by the Trust Funds Trust Agreement, which mandates that all
- 6 corporate officers accept personal liability for contributions to the Trust
- 7 Funds.
- 8 7. The Defendants are doing business within the jurisdiction of the Court as
- 9 that activity is defined under §301 of the Act.
- 10 8. That on or about October 2006, Plaintiff caused a monthly contribution
- 11 report showing that the alleged \$899.61 was paid.

12
13 Disputed Facts

14 The Plaintiffs contend as follows:

- 15 1. The Defendants signed a Collective Bargaining Agreement which requires
- 16 contributions to the Trust Funds effective March 1, 2000.
- 17 2. As shown by the payroll audit the Defendants have failed to make all the
- 18 contributions are required.
- 19 3. The Defendants have approved and ratified acceptance of the new rates as
- 20 outlined in the Master Collective Bargaining Agreement through payment of
- 21 the new rates and acceptance of employee benefits.
- 22 4. With respect to Defendants contention that the work assigned to the
- 23 employees in November and December 2005 was non-bargaining work it
- 24
- 25

1 was not designated as such in accordance with the Collective Bargaining
2 Agreement provisions.

3 The Defendant contends as follows:

- 4 1. Defendants contends that the Collective part of the Agreement entered into
5 October 5, 2000, with effective dates March 1, 2000 thru Feb. 28, 2005, and
6 is the controlling document in this case. That document expired February
7 28, 2005, without an agreement of either party as to the express terms of a
8 new agreement. The 2000 CBA contained an evergreen provision under
9 section 23.1 which stated that the Agreement would automatically renew
10 itself on an annual basis unless notice was given that the Agreement would
11 be terminated or modified. Plaintiffs did not provide notice of a modification
12 or termination of said Agreement.
- 14 2. In May of 2005, Defendant received a new Collective Bargaining
15 Agreement from the Union which included a provision increasing the
16 contribution rate from \$2.05 per hour to up to \$4.00 per hour, which
17 Defendant refused to sign.
- 18 3. Defendant immediately objected to and continues to object to the demand
19 for payment by the Union for Trust contribution rates above the rates as
20 agreed in the 2000 Collective Bargaining Agreement. After Defendant's
21 objection to the new rates under the 2005 Collective Bargaining Agreement,
22 the Defendants began to harass and threaten litigation against Defendant
23 unless he agreed to pay the rates under the new Collective Bargaining
24 Agreement.
25

- 1 4. That on or about October 2006, defendants paid the alleged \$899.61, it was
2 paid in full by crediting past overpayments.
- 3 5. The defendants paid sums sufficient to cover the requirements of the old
4 Collective Bargaining Agreement and in fact paid more than those sums on a
5 number of occasions based on miscalculations of both the Union and
6 Defendant, as well as harassment and threats of litigation from the Union.
7 The Union was always aware that defendants disputed the rates that that
8 were demanded of them on the basis that they had not signed a new and
9 were therefore, not subject to a new Collective Bargaining Agreement
10 effective after the expiration of the 2005 Agreement. To date, the Defendant
11 has overpaid the Trust, contributions in excess of \$40,000.00 under protest
12 and solely based on the continuous harassment from the Union. Defendant is
13 entitled to a refund of the overpaid contributions which were paid based on a
14 mistake of law or fact.
- 15 6. Plaintiffs are not entitled to payment of their claims of Trust contributions
16 for non union related work performed by two of the Defendant's employees
17 during the months of November and December of 2005.

18
19 Issues of Law

20 The following issues of law are to be determined by the Court:

21 I. Agreed Issues

- 22 1. Whether, as a matter of law, there is evidence to support the Plaintiffs' claim
23 that the Defendant is still a party to the Collective Bargaining Agreement,
24 effective March 2005 through current.

2. Whether, as a matter of law, there is evidence to support the Plaintiffs' claim that the Defendant has adopted the general industry employer contribution rates through its conduct.

II. Defendants' Issues

1. Whether, as a matter of law, there is sufficient evidence to support the Defendant's claim that the Defendant is still a party to the Collective Bargaining Agreement, effective March 1, 2000.

2. Whether, as a matter of law, there is sufficient evidence to support the Defendant's claim that based on the evergreen clause of Section 23.1 of the 2000 Collective Bargaining Agreement that the upon the expiration of the 2000 Collective Bargaining Agreement on February 28, 2005, that the Agreement automatically renewed upon the terms and general industry employer contribution rates from the 2000 Collective Bargaining Agreement.

3. Whether, as a matter of law, the Defendant is entitled to a refund for any Trust contribution payments made by Defendant either by a mistake of law or fact.

Expert Witnesses

On behalf of the Plaintiff:

1. Ms. Carol Olsen Steiner-Auditor
Steiner Accounting Services, Inc.
2430 240th St. SE
Bothell, WA 98021
425-483-1951

Ms. Olsen will testify to the accuracy and substance of the payroll audit.

1 On behalf of the Defendant:

- 2 1. Mr. Bret Berglund, CPA
3 Fullaway, Lamphear and Sauve, PLLC
4 5501 Pacific Highway East
5 Federal Way, WA 98424
6 (253) 952-3478

7 Mr. Berglund will testify to the amounts due and the actual amounts paid under
8 the Agreement between the parties.

9 Other Witnesses

10 On behalf of the Plaintiff:

- 11 1. Mr. Erik Reed-Administrator of the Employee Painters Trust Funds
12 Zenith Administrators, Inc.
13 201 Queen Anne Ave. N., Suite 100
14 Seattle, WA 98109-4896

15 Mr. Reed will testify to the Trust Funds' administrative policies and procedures.

- 16 2. Mr. Steven Bloom
17 Painters' District Council No. 5
18 Labor Temple, Rm. 324
19 2800 First Ave.
20 Seattle, WA 98121

21 Mr. Bloom will testify to the current status of the Collective Bargaining
22 Agreement and the relationship between the International Brotherhood of
23 Painters and Allied Trades District Council No. 5 and Brydon Painting.

24 On behalf of the Defendant:

- 25 1. Timothy E. Jackson, Defendant
President, Brydon Painting Services, Inc.
2819 – 200th Avenue East
Lake Tapps, WA 98391
(253) 891-5453

Mr. Jackson will testify to correspondence and negotiations regarding the
renewal of the Collective Bargaining Agreement and the threats made by Union

1 management regarding payment of Trust contributions which Plaintiffs allege
2 were due under the Collective Bargaining Agreement.

3 2. Jodi L. Jackson
4 Secretary, Brydon Painting Services, Inc.
5 2819 – 200th Avenue East
6 Lake Tapps, WA 98391
7 (253) 891-5453

8 Mrs. Jackson will testify regarding correspondence related to and the amounts
9 paid and amounts which the union claims were due as Trust contributions under
10 the Collective Bargaining Agreement.

11 3. Paul James
12 2819 – 200th Avenue East
13 Lake Tapps, WA 98391
14 (253) 891-5453

15 Mr. James will testify to the scope of the non-union related work which was
16 performed in November and December of 2005 for which Plaintiffs are seeking
17 trust contributions under the Collective Bargaining Agreement.

18 4. Dirk Scott Rickley
19 5125 N. 30th St
20 Tacoma, WA 98407-3305
21 (253) 503-7173

22 Mr. Rickley will testify to the scope of the non-union related work which was
23 performed in November and December of 2005 for which Plaintiffs are seeking
24 trust contributions under the Collective Bargaining Agreement.

25 5. Michael D. Ball
Business Manager
International Union of Painters and Allied Trades, AFL-CIO, CLC
District Council #5
2800 First Avenue #324
Seattle, WA 98121
(206) 441-5554

Mr. Ball will testify to negotiations regarding the 2005 Collective Bargaining Agreement and correspondence related thereto with Defendants.

6. Ron Krebs
Business Representative
International Union of Painters and Allied Trades, AFL-CIO, CLC
District Council #5

2800 First Avenue #324
Seattle, WA 98121
(206) 441-5554

Mr. Krebs will testify to negotiations regarding the 2005 Collective Bargaining Agreement and correspondence related thereto with Defendants.

7. Chris Winthers
Business Representative
International Union of Painters and Allied Trades, AFL-CIO, CLC
District Council #5
2800 First Avenue #324
Seattle, WA 98121
(206) 441-5554

Mr. Winthers will testify to discussions with Defendant's employees regarding negotiations and Defendant's refusal to accept the new Collective Bargaining Agreement.

8. Melissa Kollman
Accounts Control Technician
Zenith Administrators
Northwest Region
Suite 220, White Flag Building
104 South Freya
Spokane, WA 99202
(509) 534-5625

Ms. Kollman will testify to correspondence relating to Defendant's refusal to pay the 2005 Collective Bargaining Agreement rates.

Exhibits

Plaintiffs' Exhibits

(a) Admissibility and Authenticity Stipulated:

1. The Collective Bargaining Agreement between Brydon Painting and the International Union of Painters and Allied Trades covering the period March 1, 2000 to February 28, 2005.

2. The Master Agreement between the International Union of Painters and Allied Trades and Northwest Wall and Ceiling Contractors Association covering the period March 1, 2005 to February 28, 2010.
3. The Trust Agreements for the Employee Painters Trust Health and Welfare Fund including all drafts and amendments, effective January 12, 2001.
4. The Trust Agreements for the Western Washington Painters Defined Contribution Pension Trust including all drafts and amendments, effective September 22, 1983.
5. The Trust Agreements for the Western Washington Painters Apprenticeship and Training Trust including all drafts and amendments, effective May 15, 1996.
6. Trust Agreements for the Western Washington Painters Labor Management Cooperation Trust including all drafts and amendments, effective October 15, 1998.
7. Employer Report Forms covering the period of March 2000 through September 2006.
8. Payroll Audit Report prepared by the accounting firm of Steiner Accounting Service dated August 8, 2006, including attached Schedules I & II.
9. The Affidavit of Ms. Melissa Kollman dated January 24, 2007.
10. The Affidavit of Ms. Carol Olsen Steiner dated January 24, 2007.
11. A print-out from the Washington Secretary of State's Webpage listing the corporate officers of Brydon Painting Services, Inc.

Defendants' Exhibits

(a) Admissibility and Authenticity Stipulated:

- 1 12. Letter from Michael D. Ball, Business Manager for District Council #5 to
2 "All Employers signatory to the Western Washington Area Agreement for
3 the Painting Industry" dated February 28, 2005 regarding negotiations for
4 the 2005 Collective Bargaining Agreement.
- 5 13. Letter from Ron Krebs, Business Manager of District Council #5 to Tim
6 Jackson dated May 12, 2005 regarding request for signatures for the 2005
7 Collective Bargaining Agreement.
- 8 14. Letter from Tim Jackson to District Council #5 dated February 25, 2006
9 regarding Steiner Accounting Services, Inc. February 1, 2006 request for an
10 audit of Defendant's accounting records.
- 11 15. Letter from Melissa Kollman, Accounts Control Technician for Zenith
12 Administrators to Jodi Jackson dated September 27, 2006 regarding
13 Overpayment of contributions for Western Washington Painters' Trusts.
- 14 16. Letter from Melissa Kollman, Accounts Control Technician for Zenith
15 Administrators to Jodi Jackson dated October 16, 2006 regarding Remaining
16 Credit Balance for Western Washington Painters' Trusts.
- 17 17. Sworn Statement of Paul James dated September 28, 2006 regarding non-
18 union related work performed as employee for Defendant in November and
19 December of 2005.
- 20 18. Sworn Statement of Dirk Scott Rickley dated September 28, 2006 regarding
21 non-union related work performed as employee for Defendant in November
22 and December of 2005 attached to Affidavit of Dirk Scott Rickley dated
23 March 23, 2007.
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1 19. Statement dated October 2006 from Western Washington Painters Trusts
2 regarding monthly contribution report.

3 20. Affidavit of Tim Jackson dated March 21, 2007 with attached Exhibit
4 regarding Defendant's accounting calculations regarding overpayment of
5 Trust contributions for period of January 2001 through June of 2006.

6 21. Monthly Contribution Report Statement dated October 8, 2006, from
7 Western Washington Painters Trusts showing that a credit of \$670.08 was
8 applied.

9 22. Demand Letter from Trusts dated November 22, 2005, from Mr. John
10 Ranquet, attorney at law, to defendants. Demand Letter from Trusts dated
11 January 19, 2006, from Mr. John Ranquet, attorney at law, to defendants.
12 Correspondence letter dated February 12, 2006, from Mr. John Ranquet,
13 attorney at law, to defendants.
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15 Defendant reserves the right to call any of Plaintiffs' witnesses, and also to call
16 necessary rebuttal witnesses. Defendant further reserves the right to call any other witnesses
17 that the Plaintiffs learn about through discovery but fails to properly disclose.

18 Plaintiff reserves the right to call any of Defendants' witnesses, and also to call
19 necessary rebuttal witnesses. Plaintiff further reserves the right to call any other witnesses that
20 the Defendants learn about through discovery but fails to properly disclose.
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22 Action by the Court

- 23 1. This case is scheduled for trial without a jury on April 4, 2007, at 9:30am.
24 2. Trial briefs shall be submitted to the Court on or before Friday, March 23, 2007.
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1 **THIS ORDER** has been approved by the parties as evidenced by the signatures of their
2 counsel. This order shall control the subsequent course of the action unless modified by a
3 subsequent order. This Order shall not be amended except by order of the Court pursuant to
4 agreement of the parties or to prevent manifest injustice.

5 DATED this 2nd day of April, 2007.

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7 
8 Karen L. Strombom
9 United States Magistrate Judge
10
11

12 **FORM APPROVED**

13 s/John R. Spencer
14 WSBA #32188
15 Spencer Law Firm, LLC
16 1326 Tacoma Ave. S, Ste. 101
17 Tacoma, WA 98401-1803
Telephone: (253) 383-2770
Fax: (253) 572-4207
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s/Robert A. Bohrer
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220 W. Mercer, Ste. 400
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E-mail: r.bohrer@ekmanbohrer.com
Attorney for Plaintiff(s)

18 S:\Collections\WWP-3410\Pleadings\2007\Brydon Painting 3410 USDC Agreed Pretrial Order.doc
19 Z:\Jackson, Tim\US Dist. Court 06-0517\Pleadings\SLF Draft Agreed Pretrial Order.doc
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